IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID LANE JOHNSON, Plaintiff/Movant, vs. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, ET AL., Defendants/Respondents.	)	Case No. 5:17-cv-00047 Judge Sara Lioi

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DEFENDANT NFLPA'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

PRELIMINARY STATEMENT

Johnson's Opposition (Doc. No. 54) ("Opposition") to the NFLPA's Motion to Dismiss (Doc. No. 26-1) and Supplemental Motion to Dismiss (Doc. No. 50) (together, "Motion") offers no answer to the undisputed fact that Johnson admittedly and purposely took a "non-FDA-approved," "unregulated" banned substance from an unidentified "friend," thereby violating the 2015 PES Policy.[1] His admitted ingestion of a banned substance is the direct and sole reason he suffered the injuries averred, and Johnson thus has no standing to sue the NFLPA. He also has stated no legally viable claim against the NFLPA, the Court lacks personal jurisdiction over the NFLPA, and venue is improper. The FAC (Doc. No. 39)—Johnson's second defective pleading—should be dismissed with prejudice.

ARGUMENT

I. JOHNSON FAILED HIS BURDEN TO CLEARLY PLEAD FACTS PLAUSIBLY SHOWING HIS INJURIES TO BE FAIRLY TRACEABLE TO THE NFLPA

A. To Plead Standing, Johnson Must Plead Causation

No less authority than the Supreme Court recently held that a plaintiff "bears the burden of establishing" that his alleged injury in fact "is fairly traceable to the challenged conduct of the defendant." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[A]t the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* Johnson cannot satisfy this controlling pleading test for standing; instead, he grossly misstates it.

He writes in his Opposition that "[a]t the pleading stage, the issue is not whether the defendant 'caused' the plaintiff's injury" and "[p]roximate causation is not a requirement of Article III standing as a matter of course."[2] Opp'n, Doc. No. 54 at 2909. But Johnson's statement

[1] Defined terms herein have the same meaning as in the Motion. Unless otherwise indicated, emphasis is added and citations are omitted throughout.
[2] Johnson relies on *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 390 (6th Cir. 2016) for this proposition.

that standing does not concern causation contradicts *Spokeo* and the very cases he relies upon:

> Though the district court construed this pleading deficiency as a merits issue, we perceive a ***lack of standing***. . . . which requires allegations plausibly demonstrating a concrete or imminent injury, ***causation***, and redressability.

See Keener v. Nat'l Nurses Org. Comm., 615 F. App'x 246, 249 (6th Cir. 2015).[3]

Sixth Circuit case law is on all fours with these tenets and flatly at odds with Johnson's position: "the minimal constitutional requirements for standing" require "a causal connection between the injury and the challenged conduct." *Hooker v. Fed. Election Comm'n*, 21 Fed. App'x 402, 406 (6th Cir. 2001); *Hadley v. Chrysler Grp., LLC*, 624 F. App'x 374, 377 (6th Cir. 2015) (plaintiff must allege "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant"). Squarely on point here, the *Keener* court dismissed the employees' DFR claim for lack of standing because "[t]he complaint fail[ed] to identify any harm to the [employees] that the union's concealment has ***caused***." 615 F. App'x at 252 (finding that employees failed to allege "that they would have (or even could have) done anything differently had the [union] disclosed the agreement" with the employer). No matter the precise contours of *Spokeo*'s "fairly traceable" test, Johnson has failed his burden to "clearly" allege facts to satisfy it.

B. Johnson Has Not "Clearly" Pled Plausible Facts to Confer Standing

On the face of the FAC, all of Johnson's claimed injuries flow from the Award upholding the discipline imposed by the NFL. Mot., Doc. No. 26-1 at 834-37; Supp. Mot., Doc. No. 50 at 2248-52; Opp'n, Doc. No. 54 at 2907 (alleging that Johnson suffers "ongoing harm . . . ***because*** of the wrongful discipline imposed"). And the Award, incorporated into the FAC, says on its

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But "proximate causation" "in the liability sense" is an additional and independent deficiency with the FAC. As to standing, *Galaria* explains that "traceability" requires that the "party before the court ***causes*** the injury." *Id.*

[3] Even if the NFLPA's argument were treated as a question of whether Johnson had plausibly pleaded causation as an element of liability, rather than standing, dismissal would still be necessary, just under 12(b)(6) as opposed to 12(b)(1).

face that it resulted from Johnson's testimonial admissions to violating the PES Policy. Thus, even if Johnson had pled technical violations of the DFR and LMRDA (he has not), those violations would not have *caused* Johnson's arbitral loss and thus would not confer standing.

Unable to refute this, Johnson now argues he suffered other injuries:

> the loss of pay and bonuses from the erroneous Award; improper continuation in the reasonable cause testing program; improper placement at an elevated stage of Policy discipline; forfeiture of contractual guarantees; and costs and fees associated with his discipline appeal and with this action.

Opp'n, Doc. No. 54 at 2909 (citing FAC, Doc. No. 39 at 1779).[4] But this new list of alleged injuries provides no help to Johnson, because each one is still exclusively traceable to the Award.

With respect to Johnson's chart on pages 2909-10 of the Opposition, despite the "Injury" label, Johnson's allegations about, *e.g.*, unavailable documents, an improperly selected arbitrator, and purported NFLPA silence at the arbitration, are not alleged *injuries.* They are allegations of NFLPA *conduct*. But that brings the standing analysis back to square one: Johnson's admitted violation of the PES Policy renders it implausible that any other fact—missing documents, arbitrator selection misconduct, or otherwise—caused the adverse arbitral outcome.[5]

Johnson also misapprehends the relevance of the Award to the standing analysis. Even if Arbitrator Carter had not issued a reasoned decision, *i.e.*, a full legal opinion, it would still be implausible for Johnson to allege that his discipline is "fairly traceable" to the NFLPA's alleged conduct rather than his own admitted violation of the PES Policy. That said, the Award—which is an exhibit to, and part of, the FAC—conclusively establishes that the alleged NFLPA conduct did not plausibly cause Johnson's injuries. Indeed, Arbitrator Carter rejected Johnson's

[4] "[C]osts and fees associated with his discipline appeal and with this action" is not a legally cognizable "injury" for standing purposes—or every litigant would have standing in every case merely by filing a lawsuit or arbitration. *See Johnston v. Midland Credit Mgmt.*, No. 1:16-CV-437, 2017 WL 370929, at *4 (W.D. Mich. Jan. 26, 2017).

[5] Johnson's assertion that "[f]ailure to provide information where such is statutorily required confers standing" mischaracterizes the law. Opp'n, Doc. No. 54 at 2910-11. The Supreme Court rejected this proposition in *Spokeo*: "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549.

arguments about missing lab protocols and "side deals" between the NFLPA and the NFL because, even if true, they "did not materially affect the accuracy or reliability of the test result." Award ¶¶ 6.21-6.42, Doc. No. 39-2 at 1841-43.[6] In other words, this is the rare case on a motion to dismiss where the Court has direct and binding evidence (under the principles of collateral estoppel)[7]—incorporated into the FAC—that the Union's alleged misconduct did not cause the arbitral outcome. And, as Johnson admits, in vacatur proceedings such as here, "courts may not evaluate the merits of the underlying grievance/arbitration." Opp'n, Doc. No. 54 at 2919 n.20.

Johnson also argues he is not bound by the Award "given Johnson's allegations against the Defendants and arbitrator." *Id.* at 2911. But Johnson cannot presume success on his vacatur motion to sustain his DFR claims. Johnson's own authority provides the opposite: "[i]n the context of a hybrid 301 action, absent a finding that an erroneous arbitral decision has been reached, the inquiry into the union's failure to comply with its duty of fair representation becomes immaterial, and is not justiciable." *White v. Motor Freight, Inc.*, 899 F.2d 555, 560 (6th Cir. 1990).

Moreover, Johnson cannot evade the Award on the basis of his allegations against the arbitrator because he waived them. Mot., Doc. No. 26-1 at 836. He claims he did not waive his arguments regarding "arbitrator selection" because he "argued for that information" in the discovery hearing and "incorporated his arguments" in his appeal. Opp'n, Doc. No. 54 at 2911 (citing *The Tamarkin Co. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 377*, No. 4:09-cv 2927, 2010 WL 1434320 (N.D. Ohio Apr. 8, 2010) (Lioi, J.)). But in *Tamarkin* the party "repeatedly objected" to the arbitrator, sought pre-arbitration injunctive relief, and

[6] *See also* PES Policy, Doc. No. 39-1 at 1800 (even "[i]f the Player alleges a deviation from the Collection Procedures with credible evidence, the [NFLMC] will carry its burden by demonstrating that . . . the deviation did not materially affect the accuracy or reliability of the test result").
[7] *See* Mot., Doc. No. 26-1 at 835-36.

appeared at the arbitration solely to object to the arbitrator's appointment. *Id.* at *9. In stark contrast, Johnson affirmatively stated that he had "no objection to [Arbitrator Carter's] qualifications," made no recusal motion, and said *nothing* about arbitrator selection or bias at the hearing. Mot., Doc. No. 26-1 at 836 & n.6. As this Court stated in *Tamarkin*, "[a] party may waive its objection to the jurisdiction of [the arbitrator] by acquiescing in the arbitration with knowledge of the possible defect." 2010 WL 1434320, at *9.

In sum, Johnson saw the NFLPA's standing argument, filed a new complaint, and still cannot muster a rejoinder to the fact that Johnson was disciplined and lost his appeal because of his own conduct. His campaign to blame the NFLPA for a self-inflicted plight is implausible and deprives him of standing for each cause of action against the Union.

II. THE FAC ADDITIONALLY AND INDEPENDENTLY FAILS TO STATE ANY LEGAL CLAIM AGAINST THE NFLPA

A. The FAC Does Not State a DFR Claim[8]

1. The DFR Claim Fails Along With Johnson's LMRA/Vacatur Claims

At the threshold, Johnson must prevail on his Section 301 claims in order for the DFR claims to be justiciable. *White*, 899 F.2d at 560. Johnson responds that DFR claims *can* be brought independently from Section 301 claims (Opp'n, Doc. No. 54 at 2913 n.12), but that is not the lawsuit Johnson filed. The FAC asserts a classic hybrid claim in which the NFLPA's alleged misconduct supposedly caused the Award that Johnson seeks to vacate under Section 301. Johnson concedes that in such hybrid cases, if a union member does not succeed in vacating the arbitral award, his DFR claim fails too. *Id.*

[8] After widely publicizing his filing of unfair labor practice charges last November against the NFLPA and the NFLMC, *see* "OT Lane Johnson files complaint with NLRB over suspension," available at http://www.espn.com/espnprint?id+18117246 (Nov. 22, 2016), Johnson has now quietly withdrawn those charges after the conclusion of the NLRB's exhaustive investigation.

2. No Allegations of Bad Faith, Irrational, or Discriminatory Conduct

According to Johnson, he can state a DFR claim by pleading "bad faith" or that "the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* at 2914. None of Johnson's allegations come close to satisfying these standards. Furthermore, the Opposition fails to acknowledge that judicial review of DFR claims is "highly deferential" and that Johnson has an "enormous burden" to plead arbitrary, bad faith, retaliatory, or collusive conduct. *See* Mot., Doc. No. 26-1 at 839.

Allegations That the NFLPA Refused to Provide Favorable Evidence. Johnson presented his arguments about the documents he claims he needed to Arbitrator Carter, who ruled them irrelevant and/or unjustifiably burdensome. *See* Refiled Mot. to Vacate Arb. Award, Ex. 9, Disc. Order, Doc. No. 52-10 at 2646-47. Johnson may disagree with the neutral Arbitrator's conclusion, but in light of it, Johnson cannot plausibly allege that it would have been bad faith or irrational for the NFLPA allegedly to deny him the same documents. More fundamentally, Johnson declines to identify any "favorable" evidence that was withheld, and the assertion is hollow: what kind of favorable evidence could there have been in light of Johnson's admission of guilt?[9]

Allegations That the NFLPA Failed to Investigate Johnson's Discipline. Johnson argues that "[t]he NFLPA coerced Johnson to waive his rights under the 2015 Policy." FAC ¶ 279, Doc. No. 39 at 1770 (cited in Opp'n, Doc. No. 54 at 2915). But that allegation is demonstrably false—Johnson *did* exercise his appeal rights under the PES Policy. His additional arguments about the NFLPA purportedly failing to review the positive test results (Opp'n, Doc.

[9] Johnson's reliance on *Sparks v. Abe May Packaging Co.* to support his contention that a union's failure to transmit vital information constitutes arbitrary conduct is unavailing because that case concerned a DFR claim based on the union's failure to relay to a member a "critical term" of the employer's proposed settlement. 884 F.2d 1393, at *3 (6th Cir. 1989). Johnson identifies no "critical term" here—only documents that Arbitrator Carter ruled irrelevant and which demonstrably would *not* have changed the arbitral outcome. *See* Opp'n, Doc. No. 54 at 2916-17.

No. 54 at 2915) similarly fall short of stating a DFR claim, especially where Johnson chose to retain his own legal team to investigate and arbitrate his grievance.

Allegations That the NFLPA was Ignorant of the Policy's Terms. Neither the FAC nor the Opposition alleges *what* terms the NFLPA was supposedly ignorant of, much less how they impacted the arbitration. *See id.* at 2917. Johnson cannot meet his "enormous burden" to plead bad faith, irrational, or discriminatory conduct merely by claiming the NFLPA did not know about unspecified PES Policy terms in a grievance where Johnson had retained his own lawyers.

Allegations That the NFLPA Violated Its Constitution. Even taking at face value Johnson's assertion that the NFLPA permitted deviations from the PES Policy, did not vote on the deviations, and thereby violated its Constitution (*id.* at 2914),[10] having a rotation of two qualified, neutral arbitrators hearing PES Policy appeals—rather than three—is not plausibly irrational or bad faith. Relatedly, the NFLPA did not waive Carter's purported conflicts—it determined he did not have any, and it is the NFLPA's labor law prerogative to exercise its judgment as to Arbitrator Carter's service. *See* Mot., Doc. No. 26-1 at 842-43. The NFLPA bargained for neutral arbitration to replace the NFL's unilaterally selecting arbitrators under the PES Policy (Opp'n, Doc. No. 54 at 2915), and it is facially implausible that the NFLPA would then take two steps back by agreeing to a biased arbitrator. Indeed, Johnson had no objection to Arbitrator Carter's qualifications.

Allegations That the NFLPA Colluded with the NFL and Retaliated Against Johnson. Collusive and retaliatory conduct can state a DFR claim. However, Johnson has pleaded no such

[10] The NFLPA Constitution is incorporated by reference into the FAC, and while Johnson cites Section 6.05 about amendments to collectively bargained agreements being presented to the Board of Player Representatives for a vote (FAC ¶¶ 113-114, Doc. No. 39 at 1748), he omits the rest of 6.05: "Nothing in this Section or in this Constitution shall prohibit the Executive Director, in consultation with the President, from entering into side letters and/or other documents, including the resolution of grievances, which clarify or interpret the provisions of any existing Collective Bargaining Agreement or are necessary for the orderly implementation and administration of a Collective Bargaining Agreement." Johnson does not allege that the NFLPA Executive Director did not authorize any alleged "side letters" and fails to allege any violation of the NFLPA Constitution (Exhibit A hereto).

facts. He concedes he has not pled the "who, what, where, when, how or why" of any purported collusion, *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008), but argues that *Total Benefits*' pleading standards do not apply outside of antitrust cases. Opp'n, Doc. No. 54 at 2917 n.18. This is legally incorrect.[11] With respect to Johnson's argument that purported NFLPA silence at the hearing evidences collusion, Johnson retained his own legal team to represent him at the hearing, they presented opening and closing statements, handled all witnesses, and under the circumstances, it would not have been in bad faith or irrational if the NFLPA's lawyers had not shown up at all.

As for retaliation, Johnson says "it is difficult to pinpoint the reasoning for the NFLPA's misconduct as to Johnson," but "[i]t may be because Johnson made comments adverse to the NFLPA." Supp. Transfer Opp'n, Doc. No. 53 at 2784; Opp'n, Doc. No. 54 at 2917-18. In reality, the most plausible explanation for Johnson's failure to explain why the NFLPA would retaliate against its own member is that it did not happen. And even if Johnson's ruminations about the NFLPA's motivations were credited, Johnson would still have no answer to the fact that virtually all of the alleged NFLPA misconduct applies to *all* of the NFLPA's roughly 2,000 members (*e.g.*, FAC ¶ 309), and thus by its nature is not discriminatory towards Johnson.

3. Johnson Would Not Have Won His Appeal "But For" the NFLPA

Finally, even if Johnson had pled bad faith, arbitrary, or discriminatory conduct, none of it plausibly would have changed the outcome of the Award. In addition to depriving Johnson of standing (*supra*, Section I.B), this prevents Johnson from stating the liability elements of a DFR claim. In hybrid DFR/Section 301 cases, the Sixth Circuit requires a plaintiff to prove that he would have (or probably would have) won his arbitration but for the union's purported conduct.

[11] *See Amadasu v. The Christ Hosp.*, 514 F.3d 504, 507 (6th Cir. 2008) (conclusory allegations of concerted conduct insufficient to plead civil conspiracy); *Taylor v. Jackson Lewis LLP*, No. 3:13CV-1088-S, 2014 WL 4494254, at *5 (W.D. Ky. Sept. 10, 2014) (applying *Total Benefits* pleading requirements to civil conspiracy claim).

Wood v. Int'l Bhd. of Teamsters Local 406, 807 F.2d 493 (6th Cir. 1986). Johnson argues that the "but for" standard applied in *Wood* was not subsequently followed, *see* Opp'n, Doc. No. 54 at 2908 n.3, but one of the very decisions Johnson cites for this argument applied the district court's determination that "but for" the union's breach of its DFR, "the outcome of the grievance procedure would have been different." *Dushaw v. Roadway Express, Inc.*, 66 F.3d 129, 132 (6th Cir. 1995) (grievance must be "seriously flawed" by union's breach).[12]

B. Johnson Fails to State a LMRDA Claim Against the NFLPA

Johnson's LMDRA claim is also a sleight of hand. He has the 2015 PES Policy, which is why it is extensively quoted in the FAC; instead he complains about lacking access to a few alleged "side letters." But he has no rejoinder to *Summerville*, in which the Fourth Circuit held that LMRDA § 414 is limited to full collective bargaining agreements. *Summerville v. Local 77*, 369 F. Supp. 2d 648, 658-59 (M.D.N.C. 2005), *aff'd*, 142 F. App'x 762 (4th Cir. 2005).[13]

C. Johnson Fails to State A Declaratory Judgment Act Claim

Johnson concedes he must allege "actual present harm or a significant possibility of future harm," Opp'n, Doc. No. 54 at 2920, but the only such harms he identifies are voided contractual guarantees and continuation of reasonable cause testing. *Id.* at n.23. The FAC does not, by contrast, allege a significant possibility that his employment will be terminated or that he plans to again violate the PES Policy such that the voided guarantees or continued reasonable cause testing constitute a cognizable harm. Plus, if the DFR and LMRDA claims are dismissed, all that would be left are Johnson's requests for declarations that would constitute improper

[12] Johnson's other case, *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994), applies a similar test: "if a union fails to present favorable evidence during the grievance process, this failure may constitute a breach of its duty only if that evidence probably would have brought about a different decision."

[13] Johnson writes that the purported "harm the NFLPA's violation caused Johnson need not relate to his arbitration to be actionable" because the LMRDA is "a stand-alone claim." Opp'n, Doc. No. 54 at 2920 n.22. Even if this statement were hypothetically accurate, Johnson alleges no harm unrelated to his failed arbitration appeal.

advisory opinions.[14]

II. PERSONAL JURISDICTION IS LACKING AND VENUE IS IMPROPER

First, the NFLPA is *not* a resident of Ohio. Johnson's original allegation that the NFLPA is located in D.C. was correct, and his conclusory and contradictory assertion that the NFLPA resides in this District should not be credited. *Compare* Compl. ¶ 2, Doc. No. 1 at 2 *with* FAC ¶ 2, Doc. No. 39 at 1726.[15] ***Second***, Johnson misstates the legal standard for personal jurisdiction over non-residents because "[u]nder Ohio law, personal jurisdiction over non-resident defendants is available only if (1) the long-arm statute confers jurisdiction and (2) jurisdiction is proper under the Federal Due Process Clause." *Conn v. Zakharov*, 667 F.3d 705, 712-13 (6th Cir. 2012). Here, the FAC fails at step one. *See* Mot., Doc. No. 26-1 at 845-46. ***Third***, even if the Court reached a Due Process Clause analysis, the conduct at issue would not subject the NFLPA to specific jurisdiction because it is unrelated to Ohio. *See* Supp. Mot., Doc. No. 50 at 2257. Nor is there general jurisdiction over the NFLPA—even a "substantial, continuous, and systematic course of business" would be insufficient for this purpose. *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014). The NFLPA is not essentially "at home" in Ohio. *See id.* at 761.

Finally, venue is improper for the reasons previously established.[16] And, contrary to Johnson's contentions (Opp'n, Doc. No. 54 at 2924 n.31), the LMRDA does not establish venue in this District because Johnson does not allege that he (as opposed to his lawyers) was denied collectively bargained documents here.

CONCLUSION

All Counts against the NFLPA should be dismissed with prejudice.

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[14] *See* Supp. Mot., Doc. No. 50 at 2256.

[15] The fact that player members of the NFLPA may reside in Ohio is irrelevant, as under Ohio law, an unincorporated nonprofit association "is a legal entity distinct from its members and managers." Ohio Rev. Code § 1745.08(A).

[16] *See* NFLPA Transfer Briefing, Doc. No. 16-1 at 725-26; Doc. No. 37 at 1691-94; Doc. No 47 at 2048-50.

Dated: April 10, 2017

Respectfully submitted,

/s/ Thomas D. Warren
Jeffrey L. Kessler (*pro hac vice*)
David L. Greenspan (*pro hac vice*)
Jonathan Amoona (*pro hac vice*)
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-4698
Facsimile: (212) 294-4700
Email: JKessler@winston.com
Email: DGreenspan@winston.com
Email: JAmoona@winston.com

Thomas D. Warren
Baker & Hostetler LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
Email: TWarren@bakerlaw.com

Ann Yackshaw
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Telephone: (614) 228-1541
Facsimile: (614) 462-2616
Email: AYackshaw@bakerlaw.com

Attorneys for Defendant/Respondent
National Football League Players Association

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to Local Rule 7.1(f), the undersigned certifies that as of the date of filing, April 10, 2017, this case has not yet been assigned to a track and further certifies that the foregoing memorandum adheres to the page limitations set forth in Local Rule 7.1(f) and the Court's Initial Standing Order.

/s/ Thomas D. Warren

Attorney for Defendant/Respondent
National Football League Players Association

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Thomas D. Warren

Attorney for Defendant/Respondent
National Football League Players Association